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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
*Petitioner,*

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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## QUESTIONS PRESENTED

(1) Whether the Fifth Circuit applied an inappropriate standard in denying a stay of execution, necessitating reversal by this Court.

(2) Whether this Court should adopt a standard which requires the granting of a stay in all cases in which a death-sentenced prisoner's constitutional claims upon a first federal habeas corpus appeal are not legally frivolous.

(3) Whether the introduction of the "hypothetical" testimony of Doctors Grigson and Holbrook severely undermined the reliability of the fact-finding process at petitioner's penalty trial, in violation of his rights under the Eighth and Fourteenth Amendments.

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THOMAS A. BAREFOOT,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation

established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. E.g., Furman v. Georgia, 408 U.S. 238 (1972); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982). The Fund has also appeared before this Court as amicus curiae in capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Adams v. Texas, 448 U.S. 38 (1980).

The Legal Defense Fund currently represents a substantial number of indigent condemned prisoners in the states of the Fifth Circuit and elsewhere, including several who are at various stages of

federal habeas corpus proceedings. It is frequently called upon, and it tries to the extent of its capacities, to provide consultative assistance to attorneys representing other capital defendants in the Fifth Circuit and across the nation.

The issues presented by this case are of the utmost concern to all death-sentenced prisoners throughout the country, including many represented by the Fund. Consent has been granted by both petitioner and respondent for the filing of this amicus curiae brief.

## STATEMENT OF THE CASE

### I. Proceedings In The State Courts

#### A. The Trial

On November 17, 1978, after a jury trial in the 27th Judicial District Court of Bell County, Texas, petitioner Thomas A.

Barefoot was convicted of capital murder for the August 7, 1978 homicide of Carl LeVin, a Harker Heights, Texas, police officer.

On Monday, November 20, 1978, a penalty trial commenced before the same jury pursuant to Tex. Code Crim. Pro. Art. 37.071[1/]. At this proceeding it was established that petitioner had the following previous criminal convictions: (i) possession of marijuana and unlawfully carrying a weapon (November 26, 1974, Fifteenth District Court of Lafayette Parish, Louisiana) (sentence: six months imprisonment); (ii) possession of amphetamines and distribution of marijuana (Decem-

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1/ In such a proceeding the State has the burden of proving beyond a reasonable doubt that the answer to each of the following questions is "yes":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the

[footnote 1/ continues on next page]

ber 2, 1974, Fifteenth District Court of Lafayette Parish, Louisiana) (sentence: five years in prison, probated; one year in the parish jail); and (iii) possession of an unregistered firearm (a sawed-off shotgun) (October 24, 1975, United States District Court for the Western District of Oklahoma) (sentence: one year imprisonment). See SF 2112-13.[2/] At the guilt stage the prosecution also presented evidence that on January 9, 1978, petitioner

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1/ continued

reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

A "yes" answer to all three questions results in a mandatory sentence of death.

2/ Numbers preceded by "SF" refer to pages of the Statement of Facts of petitioner's trial.

had escaped from a jail in Valencia County, New Mexico, where he was being held on charges of statutory rape and unlawful restraint of a minor child by force or deception with intent to commit criminal sexual penetration against the child's will. See SF 2120-21.[3/]

The prosecution called several reputation witnesses at the penalty trial, from sites in Kansas, Louisiana, Oklahoma, New Mexico, and Texas. They testified that petitioner's reputation for being a peaceful and law abiding citizen was bad in their respective communities. See Barefoot v. State, 596 S.W.2d 875, 888 (Tex. Crim. App. 1980).

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3/ The introduction into evidence of these extraneous alleged offenses, never adjudicated in the New Mexico courts, led two judges of the Texas Court of Criminal Appeals to vote for reversal of petitioner's conviction and sentence. They argued that the allegations had only a "slight probative value" which was "far outweighed by heavy prejudice." Barefoot v. State, 596 S.W.2d 875, 889 (Tex. Crim. App. 1980).

Finally, the prosecution called two psychiatrists at the penalty phase, Doctors John T. Holbrook and James P. Grigson. Their testimony is summarized in Appendix A to this brief. It suffices to note here that both doctors diagnosed petitioner, without having examined him, as a severe sociopath who would commit future violent acts whether in prison or out, and that Dr. Grigson described the likelihood of petitioner committing such future violent acts as "one hundred percent and absolute." SF 2131.[4/]

On November 22, 1978, the jury answered "yes" to the statutory special issues which determine the sentence in Texas capital cases, and Thomas Barefoot was sentenced to die.

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4/ Both Dr. Grigson and Dr. Holbrook had testified for the prosecution in numerous other Texas death penalty cases, repeatedly predicting future dangerousness of capital defendants. A summary of their known appearances is set forth in Appendix B to this brief.

B. The Appeal

On petitioner's appeal to the Texas Court of Criminal Appeals, his challenge to the admissibility of the testimony of Doctors Grigson and Holbrook was rejected. Barefoot v. State, 596 S.W.2d 875, 887 (Tex. Crim. App. 1981). On June 29, 1981, this Court denied certiorari. 453 U.S. 913 (1981) (Justices Brennan and Marshall dissenting).

C. The State Habeas Corpus Proceeding

On October 6, 1981, the state judge that presided over petitioner's trial issued a seven-page opinion recommending the denial of state habeas corpus relief without an evidentiary hearing. Among the claims specifically rejected on the merits was an attack upon the hypothetical testimony of Doctors Grigson and Holbrook as a violation of petitioner's rights under the Eighth and Fourteenth Amendments:

> The use of psychiatric testimony on the issue of dangerousness has been approved by the Supreme Court in Jurek vs. Texas, 428 U.S. 262 (1976) and Estelle vs. Smith, ____ U.S. ___ (1981) by necessary implication. The fact that the psychiatrists did not personally examine the Petitioner but rather testified on the basis of hypothetical questions goes to the weight and not the admissibility of the expert opinion. Barefoot vs. State, 596 S.W. 2nd 875 (Tex. Cr. App. 1980).

Ex Parte Barefoot, No. 26,812-A, order of Oct. 6, 1981, p. 6 (27th District Court of Bell County, Texas).[5/] The following day, the Texas Court of Criminal Appeals summarily denied state habeas corpus relief without opinion.

II. Proceedings In the Federal Courts

A. Proceedings In the District Court

The instant federal habeas corpus proceeding commenced on October 14, 1981, in the United States District Court for

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5/ This order appears in the record as Exhibit B to respondent's answer to petitioner's federal habeas corpus petition, district court docket record entry 20.

the Western District of Texas. An evidentiary hearing was held on July 28, 1982, before Hon. Lucius D. Bunton.

A summary of that hearing appears as Appendix C to this brief. For present purposes we note only that the opinions below do not accurately describe the testimony adduced. Specifically, petitioner's two experts repeatedly declined to offer any diagnosis of petitioner, and both stated that no such diagnosis could be made to a reasonable medical certainty without examining the patient. They also testified that it is impossible for doctors to predict long-term future dangerousness as a matter of scientific expertise.

Following the submission of proposed findings of fact and conclusions of law by both sides, Judge Bunton entered a 13-page opinion denying habeas corpus relief on

November 12, 1982. With respect to the issue concerning psychiatric testimony, Judge Bunton found -- tracking the language of the State's post-hearing submission verbatim[6/] -- that

> [B]ased upon the facts stated in the hypothetical question posed by the prosecutor at trial, all medical experts at the evidentiary hearing agreed with [the Grigson-Holbrook] ... diagnosis. Dr. Fred Fason, a psychiatrist who testified on behalf of Petitioner, testified that he was 90% sure that Petitioner was a severe antisocial sociopath who would commit future acts of violence dangerous to society. Dr. Wendell Dickerson, a psychologist, testified that he was almost 90% sure of the same decision. Dr. Richard Koons and Dr. Parker testified that they were extremely sure of the same conclusion.

Slip op. at 11. Judge Bunton further held that this Court had "specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter

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6/ See Respondent's Proposed Findings of Fact and Conclusions of Law, district court docket record entry 40, p. 10.

that may be considered by the jury" in Jurek v. Texas, 428 U.S. 262 (1976), and Estelle v. Smith, 451 U.S. 454 (1981). Id. at 10.

On December 3, 1982, the district court ordered that a certificate of probable cause be issued pursuant to 28 U.S.C. § 2253 and F.R.A.P. Rule 22(b). On December 13, 1982, the court formally issued the certificate and further certified that petitioner was a pauper and that his appeal was being taken in good faith. However, on December 4, 1982, Judge Bunton granted respondent's motion to vacate the stay of execution entered at the commencement of the federal habeas corpus proceeding.7/

B. Proceedings In The Fifth Circuit

Following the denial of federal habeas

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7/ Petitioner's counsel never specifically asked the district court for a stay pending appeal, as required by F.R.A.P. Rule 8(a), and the record is therefore silent as to how the district court would have ruled upon such a request.

corpus relief, the state trial court set an execution date for January 25, 1983.

Petitioner's application to the Fifth Circuit for a stay pending appeal was filed on Friday, January 14, 1983. 8/ The application stresssed the Eighth Amendment issue raised by the hypothetical predictions of future dangerousness rendered by Doctors Grigson and Holbrook; it cited decisions of other courts supporting petitioner's challenge to this kind of evidence; and it informed the court that the American Psychiatric Association was prepared to file an amicus curiae brief on the question in petitioner's appeal. (See Stay Application, Exhibit H, letter of January 14, 1983, from the Association's

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8/ The chronology of events between the setting of the execution date and the filing of the Fifth Circuit stay application is summarized in the Fifth Circuit application at pp. 1-4. That application was submitted to this Court as part of petitioner's application for a stay herein.

counsel to petitioner's counsel.)

At approximately 3 p.m. on Monday, January 17, 1983, the court of appeals scheduled oral argument on the stay application for Wednesday, January 19 at 9:00 a.m. in Houston, Texas, before a panel of Judges John R. Brown, Thomas M. Reavley, and E. Grady Jolly. On Tuesday, January 18, the State's papers in opposition to the stay were filed.

On the morning of Wednesday, January 19, Judge Brown was unavailable due to illness and was replaced on the panel by Judge Carolyn D. Randall. Judge Reavley advised counsel for both sides in open court that Judge Randall had not yet seen any of the papers filed. Oral argument took place on January 19 between approximately 9:30 a.m. and 11:00 a.m.

At oral argument, counsel for respondent submitted a copy of the transcript of the habeas corpus hearing conducted in the

district court,[9] and counsel for petitioner submitted four additional exhibits in support of the application for a stay. After oral argument, at approximately 12:10 p.m. on January 19, the court was provided with a copy of the stenographic record of petitioner's state court trial and sentencing hearing. That record is approximately 1400 pages long.

At about 1 p.m. the following day, Thursday, January 20, the Fifth Circuit issued a 16-page opinion denying a stay of execution. On the question of the admissibility of the psychiatric testimony, the court found that

> All of the experts have testified that the conduct of the peti-

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9/ The stenographer's certification indicates that this 258-page transcript was not completed until January 14, 1983. It had not been made available to petitioner's counsel prior to oral argument on the stay application. A representative of petitioner's counsel in Austin, Texas obtained a copy from the Texas Attorney General's office on the afternoon of January 20, after the court of appeals had denied the stay.

> tioner, to which the assumed facts adhered in the hypothetical question put to the psychiatrists at the original trial, was the conduct of a severe sociopath. They disagreed over the degree of certainty with which future conduct could be predicted, but this only shows a difference of opinion among professionals -- no rarity to the courts or to citizens who serve as jurors.

Slip op. at 7. The court believed that the admissibility of such hypothetical testimony had "by implication" been upheld in Jurek v. Texas, supra, and Estelle v. Smith, supra (id. at 9), commenting that

> if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable?

Id. at 10.

## SUMMARY OF ARGUMENT

I. The Fifth Circuit's denial of a stay of execution pending appeal in this case was completely out of line with the approach

to stay applications followed in prior cases by the Fifth Circuit itself, by all other Circuits, and by this Court. The approach taken in this case would, if approved by this Court, thrust unnecessary and inordinate burdens upon the courts of appeals and this Court every single time an execution date is set following the denial of federal habeas corpus relief by a district court in a capital case. Worse yet, it would virtually guarantee that some mistakes will be made in the frenzied eleventh-hour proceedings which inevitably accompany stay applications, with the result that some death-sentenced prisoners whose habeas corpus appeals would have succeeded will nonetheless be executed without an appeal. The States suffer no irreparable harm in allowing a death-sentenced prisoner's first federal habeas corpus appeal to be heard on the merits; yet the harm to the prisoner is both

irreparable and of the greatest magnitude. A stay pending appeal should be granted unless the condemned prisoner's constitutional claims are legally frivolous.

II. The prosecution's use of the "hypothetical" testimony of Doctors Grigson and Holbrook at the penalty phase of petitioner's capital trial severely undermined the reliability of that proceeding. This testimony had no scientific basis whatsoever, yet the prosecution was allowed to parade it in front of a lay jury as a legitimate expert opinion addressing the very statutory question which the jury was required to answer in deciding whether petitioner would live or die. No prior decision of this Court supports the use of such testimony. To the contrary, the Court's repeated emphasis in recent years on the need for reliability in death-sentencing determinations requires that such testimony not be

permitted into evidence.

## ARGUMENT

### I

### BECAUSE THE FIFTH CIRCUIT APPLIED AN INAPPROPRIATE STANDARD IN DENYING A STAY OF EXECUTION, THIS COURT SHOULD REVERSE AND ADOPT A STANDARD WHICH REQUIRES THE GRANTING OF A STAY IN ALL CASES IN WHICH A DEATH-SENTENCED PRISONER'S CONSTITUTIONAL CLAIMS UPON A FIRST FEDERAL HABEAS CORPUS APPEAL ARE NOT LEGALLY FRIVOLOUS

#### A. The Denial Of A Stay In This Case Represents A Departure From The Approach To Stay Applications Followed In Prior Cases By The Fifth Circuit Itself, By All Other Circuits, And By This Court

Following this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), and companion cases, individuals sentenced to death under the sorts of capital punishment statutes upheld therein began to enter the federal district courts seeking redress of asserted constitutional defects in their convictions and sentences, as is their right under the federal habeas corpus jurisdiction conferred by 28 U.S.C.

§2241 et. seq. Inevitably, these cases made their way to the federal courts of appeals. By our count, the courts of appeals have decided 41 post-Gregg capital habeas corpus cases to date, and approximately 60 more are now pending.

In some of these cases, stays of execution pending appeal were granted by the district courts; in a great many cases, stays were granted by the courts of appeals.

Prior to this case, the Fifth Circuit had granted such stays in at least eleven cases[10/] and denied stays in only two instances: a successive habeas corpus proceeding in Spenkelink v. Wainwright, No. 79-8211 (May 22, 1979),[11/] and the case

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10/ See Appendix D to this brief.

11/ Spenkelink's subsequent stay application to this Court was denied by Justices Rehnquist and Stevens, granted by Justice Marshall, and denied by the full Court. 442 U.S. 901, 1301, 1308 (1979).

[footnote 11/ continues on next page]

1982, rehearing denied, Dec. 6, 1982), stay and cert. denied, ___ U.S. ___, 51 U.S.L.W. 3469 (Dec. 6, 1982). Every other court of appeals faced with a stay application since 1976 has granted the stay.[12/] Most of the orders granting stays contain no detailed discussion of the appropriate standard to be applied, deciding simply that -- in view of the irreparability of the harm facing the appellant if a stay were not granted -- the appropriateness of a stay was obvious. As the Eleventh Circuit observed in Dobbert v. Strickland, 670 F.2d 938, 940 (11th Cir. 1982):

> Unless the execution of sentence is stayed in this case, the issues on

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11/ continued

See also Spenkelink v. Wainwright, No. 79-8215 (5th Cir. May 24, 1979)(vacating stay granted by a Circuit Judge on original habeas corpus), stay denied, 442 U.S. 906 (1979).

12/ See Appendix D to this brief.

> appeal would become moot, and the defendant would never have his day in this court on Constitutional issues. Because the brief period of time between the filing of this appeal and the scheduled execution is insufficient to consider properly the merits of the issues raised, this Court must stay the execution of the death sentence. Where the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, as in this instance, a stay should be granted.

Where the standard has been discussed, the inquiry most often has begun and ended with the observation that the appellant's claims could not be deemed frivolous. See, e.g., Hance v. Zant, No. 82-8342 (11th Cir. June 9, 1982)(not "patently frivolous"); Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982)("not frivolous;" "non-frivolous issues that are not foreclosed by the state court processes"). As the Fourth Circuit noted in Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980)(Phillips, J.):

> [I]t may be appropriate to require a facial showing of substance to justify a stay [citation omitted]. But ... the inquiry into substance prop-

> erly stops with identification of the nature of the issue, and with consideration as to whether it has been already fairly litigated on the merits under procedures designed for the purpose. In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits.

The principle underlying this approach was perhaps best summarized by Chief Judge Godbold of the Eleventh Circuit in Goode v. Wainwright, supra, 670 F.2d at 941 (emphasis in original):

> Under the laws of our country petitioner is given the right to seek review in the federal courts of claims based upon our national Constitution and arising from his State court conviction. If he is denied relief in the federal district court then the law gives him the right to appeal.
>
> There are sharply differing views over whether our law ought to provide that one convicted of crime in State court may obtain a second "collateral" review in federal courts of constitutional issues arising from his conviction. But the law of our country does provide for it, and federal court judges take an oath to carry out that law.

This consistent approach of all courts of appeals (including, until recently, the Fifth Circuit) to stay applications in death cases adheres to this Court's reiterated concern that condemned prisoners not be put to death without full consideration of the constitutionality of the proceedings which have brought them to the brink of execution. See, e.g., Lenhard v. Wolff, 443 U.S. 1306 (1979)(Rehnquist, Circuit Justice); Evans v. Bennett, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice) (noting the "obviously irreversible nature of the death penalty"); Gregg v. Georgia, 429 U.S. 1301 (1976)(Powell, Circuit Justice)("If the executions in these cases were carried out before the petition for rehearing could be acted on by the Court, the harm to petitioners obviously would be irreparable. In addition, the cases would then be moot. Nor is there any reason to believe that the granting of a stay ...

will prejudice the interests of the respondent states"); Maxwell v. Bishop, 385 U.S. 650 (1967), subsequent history in 398 U.S. 262 (1970); Burwell v. Teets, 350 U.S. 808 (1955); cf. Williams v. Georgia, 349 U.S. 375, 390-91 (1955).

Nonetheless, the Fifth Circuit has held in this case that it will treat stay applications in death cases no differently than stay applications in civil litigation. Relying upon two stay opinions in a prisoners' rights class action which has dragged on for more than decade and which obviously would not have become moot regardless of the disposition of the stay applications,[13/] the court of appeals below required petitioner Barefoot to establish a "likelihood of success on the merits" and "a substantial case on the merits of ... [a] serious legal question."

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13/ Ruiz v. Estelle, 666 F.2d 854, 857 (5th Cir. 1982); Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981).

Slip op. at 3. We have demonstrated above that this novel approach to stay applications in death cases is entirely out of line with the approach of all other Circuits and of this Court. We shall next examine whether it has any place in a civilized and sensibly administered system of justice.

B. The Fifth Circuit's New Approach To Stay Applications Presents A Distinct Risk That Some Death-Sentenced Prisoners Whose Habeas Corpus Appeals On The Merits Would Have Succeeded Will Nonetheless Be Executed, And Places Unnecessary Burdens Upon The Courts of Appeals and Upon This Court, Even Though The States Suffer No Irreparable Harm In Allowing Such Appeals To Be Heard On The Merits

In considering whether there is any justification for the Fifth Circuit's approach in this case to the processing of stay applications, it is instructive to examine from past experience how many capital federal habeas corpus appeals are likely to be meritorious. Since 1976 the federal courts of appeals nationally

have decided 41 capital cases on the merits.[14] According to our records, 30 (73.2%) of these have been decided in favor of the death-sentenced individual. In the Fifth Circuit, 27 capital cases have been decided on the merits during this period. Of the 27, 21 (77.7%) have been decided in favor of the death-sentenced individual. Even looking solely at cases in which the death-sentenced habeas corpus petitioner was the appellant, the ratio of rulings in the petitioner's favor has been extremely high: of 21 such capital appeals decided by the Fifth Circuit since 1976, 15 (71.4%) were decided favorably to the death-sentenced individual (although one was later reversed by this Court and another is presently pending on a grant of certiorari).[15] Additionally, the cases

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14/ A list of the 41 cases appears as Appendix E to this brief.

15/ See Appendix E, cases numbered 2-4, 6-8, 11-13, 16, 18, 20 and 24-26.

in which a petitioner-appellant was denied relief were difficult cases. One has been subsequently questioned by the Eleventh Circuit in the light of a more recent decision of this Court;[16/] in another, the petitioner was granted a stay and plenary review on a successive federal habeas proceeding raising significant issues mishandled by prior habeas counsel;[17/] and a third, initially affirmed by a panel only two days after oral argument, became the subject of an en banc proceeding in which the Fifth Circuit divided by a 6-5 vote.[18/]

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16/ See Proffitt v. Wainwright, 685 F.2d 1227, 1261-62 n.52 (11th Cir. 1982), holding that Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), was overruled in part by Godfrey v. Georgia, 446 U.S. 420 (1980).

17/ Baldwin v. Maggio, No. 82-3318 (5th Cir., stay granted May 24, 1982; argued August 19, 1982); for prior proceedings see Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981).

18/ Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), reviewing the panel decision in Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981).

This record raises serious doubt whether there is any justification at all for the Fifth Circuit to be scrutinizing the merits of constitutional issues presented in haste and under pressure on stay applications, as was done in petitioner's case, prior to briefing, oral argument, and deliberate consideration of the whole appeal. An extraordinary proportion of capital federal habeas corpus appeals do have merit, even though they present claims that have been unsuccessful in the state courts, on certiorari, and in the federal district courts prior to reaching the court of appeals. Accordingly, the sort of rushed procedure which took place in the present case, apparently designed to weed out an occasional meritless appeal, seems largely unnecessary and entirely counter-productive. This is particularly so since the States suffer no irreparable harm if an occasional meritless appeal

lasts four or six months instead of being cut short on a stay application after four or six weeks. On the other hand, the harm to the appellant who is executed is obviously both of enormous magnitude and irreparable, especially if he or she happens to be one of the large proportion -- 71.4% to date in the Fifth Circuit -- who prevail when accorded the measured and deliberate reflection which a full appeal on the merits provides.

Some may doubt whether any death-sentenced person with a potentially meritorious case could fail to persuade any panel of federal appellate judges to grant a stay under the "substantial case" standard employed by the court of appeals below. We believe, however, that the risk is very great, considering the rushed nature of the proceedings in which stay applications are determined. As the number of capital cases to reach the federal appellate level has

grown, the ability of experienced organizations such as the NAACP Legal Defense Fund to monitor such cases effectively has diminished rapidly. Today, a disturbingly large number of death row prisoners are not represented on federal habeas corpus by attorneys with specialized competence in capital litigation. Indeed, many are now represented by criminal law practitioners with minimal past exposure to constitutional law, appellate practice and the federal courts. These attorneys are often solo practitioners with limited resources and facilities. They are simply incapable of turning out extensive stay applications on complex constitutional issues overnight. Frequently they do not even have the xerox facilities needed to reproduce the extensive documentation of prior proceedings which ideally should accompany stay applications. In the near future, this situation is bound to worsen. Demonstrating the

potential merit of a potentially meritorious appeal is no simple matter for an inexperienced lone practitioner, trying to meet the obligations of a paying practice while devoting such volunteer time as can be mustered, with limited facilities and support staff, to the frantic preparation of stay papers in an effort to save the client's life.

The rushed nature of proceedings on stay applications can cause even more experienced practitioners to overlook factual or legal authority which might save the life of a death-sentenced prisoner. For example in Brooks v. Estelle, No. 82-1613 (5th Cir. No. 26, 1982, reconsideration denied, Dec. 6, 1982), counsel overlooked an important Fifth Circuit precedent in support of one of the petitioner's principal arguments on his motion for a stay in the court of appeals -- the claim that the granting of a certificate of

probable cause by the district court required the Fifth Circuit to hear his appeal on the merits rather than rendering it moot by denying a stay. Reliance was placed primarily upon a decision of the Ninth Circuit, Fouquette v. Bernard, 198 F.2d 96, 98 (9th Cir. 1952) (Denman, C.J.), which of course was not binding upon the Fifth, holding that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute ... [the petitioner] pending its consideration." But subsequent to Mr. Brooks' execution, amicus has discovered a Fifth Circuit case which cited Fouquette with approval for the same proposition. United States ex rel. Goins v. Sigler, 250 F.2d 128, 129 (5th Cir. 1957).[19/] Since

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19/ Goins cites the decision of yet another Circuit which has embraced Fouquette. United States ex rel. DeVita v. McCorkle, 214 F.2d 823 (3rd Cir. 1954).

For a full history of the Goins case, documenting a 13 year struggle which culminated in the granting of habeas corpus relief, see Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968).

the Fifth Circuit strictly adheres to the rule that only the en banc court may overrule the prior decision of a panel,[20/] a citation to Goins in Mr. Brooks' Fifth Circuit papers should have caused the Brooks panel to stay his execution. Yet in the last-minute flurry of activity in Brooks, there was inadequate time to uncover the crucial Goins precedent.

Inevitably, as the number of persons on death row across the nation rises, and as the number of capital federal habeas corpus appeals rises, mistakes of this sort are bound to occur if every stay application becomes a frenzied "mini-appeal" in which the court of appeals convenes in haste to judge in haste whether each

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20/ See, e.g., Ruiz v. Estelle, supra, 666 F.2d at 857 n.5 and cases cited therein (5th Cir. 1982) (per Rubin, J., Presiding Judge of the Brooks panel) ("'we cannot disregard the precedent set by a prior panel, even though we perceive error in the precedent'"); United States v. Rodriguez, 585 F.2d 1234, 1247-48 (5th Cir. 1978) (per Rubin, J.) (even dictum of prior panels should be adhered to).

petitioner's hastily drawn stay papers demonstrate a likelihood of success on the merits. There are now 1,147 person under sentence of death nationally, 221 of them in the Fifth Circuit.[21/] Approximately 60 cases have already reached the federal courts of appeals, and roughly 100 more are pending in the federal district courts. As more and more individuals are sentenced to death, more and more cases will move into the federal courts and ultimately to the courts of appeals. If the approach of the Fifth Circuit to this case is embraced by this Court, every federal habeas appeal will become an occasion for the courts of appeals -- and ultimately this Court as well -- to interrupt their regular business and dislocate their regular schedules in order to conduct a harried inquiry into whether or not the appeal is likely to succeed.

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21/ NAACP Legal Defense Fund, Death Row: USA (Feb. 20, 1983).

We respectfully submit that this is no way to handle cases in which the stakes are higher than in any other litigation. "[T]he action of the sovereign in taking the life of one of its citizens ... differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Fairness, and the appearance of fairness (ibid.), must at all times govern the consideration of applications for stays of execution. Yet the approach adopted by the Fifth Circuit in this case promotes the very opposite. If this had been any non-death case, civil or criminal, petitioner would have had the opportunity for full briefing on the merits, and the court of appeals would have had more than a day to study the voluminous record[22/] and to study

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22/ Notably, the court of appeals rejected one of petitioner's contentions — a claim that the prosecution had knowingly presented perjured eyewitnesses testimony at trial — on the ground that the testi-

[footnote 22/ continues on next page]

the impressive body of case law and psychiatric authority relevant to his appeal. It is senseless to accord him any less because his life is at stake.

Other concerns underscore the improvident nature of the stay procedure employed by the Fifth Circuit in petitioner's case, by which a preliminary screening of merit comes to be converted into an appeal-before-the-appeal. The time of circuit judges which is diverted from their conduct of their regular appellate business, and the disruption of the orderly procedures through which that business is necessarily carried on, are drains upon the federal judiciary that can only hamper its ability

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22/ continued

mony in question "could not affect the determination of Barefoot's guilt," slip op. at 14, in view of the strength of the prosecution's other evidence. This conclusion required thorough familiarity with the entire 1400 page trial record, which the court of appeals possessed for exactly 24 hours before delivering its 16-page opinion.

to do all of its important work well. The burdens that are imposed upon this Court when a stay is denied -- or, indeed, when a stay is granted under standards that implicate a decision on the merits and hence invite the State to seek its review here[23/] -- are a further drain upon the country's single most limited and precious judicial resource. The pressure-cooker atmosphere that inescapably builds up around these frenetic eleventh-hour proceedings is altogether inconsistent with the tone of measured deliberation that should mark the due administration of justice in the federal courts, particularly in matters of the gravest moment.

But, without denigrating these concerns in the slightest, we do not believe that they go to the heart of the matter.

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23/ See, e.g., O'Bryan v. Estelle, 691 F.2d 706 (1982), motion to vacate denied, ___ U.S. ___, No. A-396 (Oct. 29, 1982).

Far more basic is the question how a court system which acknowledges that "the imposition of death by public authority is so profoundly different from all other penalties" because of, inter alia, the "nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence," Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion), can fairly or rationally give death-sentenced appellants only a drastically abbreviated version of the ordinary processes vouchsafed to all other litigants for review of their contentions on appeal. Why should the circumstance that the State -- the opposing litigant -- has unilaterally chosen to set an execution date which deprives a federal appellate court of the time necessary for its usual measure of deliberate reflection be permitted to harry it into giving the most truncated consideration to the cases with the most

momentous consequences?

If the State had any substantial countervailing interests at stake, perhaps the question would be a closer one. But given the large numbers of cases nearing the end of the federal habeas corpus process, it is readily apparent that the States' interest in having some executions take place will necessarily be satisfied in the near future in any event. Executions, so rare in recent years, are obviously likely to become more frequent occurrences in the future. It matters little to the States whether, in any given case, a condemned individual is allowed to remain alive long enough for one full federal habeas corpus proceeding including an appeal.

Second and successive federal habeas corpus petitions present a different issue. To the extent that these involve the danger that a condemned inmate might attempt to

use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing such abuses of the writ. Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts amply protects that interest; and when a repeater petition has been dismissed under Rule 9, a more restrictive standard may appropriately be employed in assessing whether the petitioner should be granted a stay pending appeal. But a first federal habeas corpus petition -- such as the one now before this Court -- is nothing more or less than the process necessary to assure that a death-sentenced inmate has his or her properly preserved federal constitutional claims determined once on the merits by the federal judiciary, pursuant to 28 U.S.C. §§ 2241(c)(3) and 2254. Whatever harm the State encounters by postponement of an execution to permit that process

to take place is by no means irreparable.

Yet the truism bears repeating that the injury suffered by the death-sentenced individual whose appeal is cut short is irreparable. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 953 (1981) (opinion of Justice Stevens). As we have noted earlier, see pp. 26-28 supra, a remarkable number of habeas corpus appeals in death cases do have merit. Under the approach taken by the court of appeals in this case, it is virtually inevitable that at least some individuals whose lives would have been spared by a full appeal on the merits will be executed without ever being accorded such an appeal. That price is simply too great for a civilized nation to pay.

### C. The Appropriate Standard For The Granting Of A Stay Of Execution In A Death Case Should Be A Determination That The Death-Sentenced Prisoner's Claims Are Not Legally Frivolous

We believe that the correct standard for evaluation of a first-time federal

habeas appellant's application for a stay of execution is whether his or her appeal presents any non-frivolous constitutional issue. This standard, which has been applied with consistency in recent Eleventh Circuit cases, see Hance v. Zant, supra, (issues which are not "patently frivolous"); Goode v. Wainwright, supra, 670 F.2d at 942 ("non-frivolous" issues), minimizes the risk that stays will be denied to appellants who might ultimately prevail on the merits, and also minimizes the amount of time that judges are required to spend evaluating stay applications, while preserving a check -- if a check is deemed necessary -- against the delay of an execution by a truly meritless appeal. We also think that a "legally frivolous" standard provides the clearest possible guideline for judicial action, particularly under the conditions of haste that typically attend consideration of stay applica-

tions, and is thus least likely to be misapplied in practice, whether by granting or denying stays erroneously.

A "legally frivolous" issue is one which is either (a) clearly foreclosed by a squarely controlling[24/] recent holding[25/] of this Court,[26/] or (b) lacking

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24/ A claim cannot be deemed legally frivolous by extrapolation of the language of a prior opinion to resolve issues not presented in the earlier case. Thus, the Court's refusal to find Ga. Code Ann. § 27-2534.1(b)(7) facially unconstitutional on grounds of either overbreadth or vagueness in Gregg v. Georgia, 428 U.S. 153, 201, 202 n.54 (1976), did not render frivolous a subsequent contention that the same statutory section was overbroad or vague in its application to the facts of another case. See Godfrey v. Georgia, 446 U.S. 420 (1980).

25/ A claim cannot be deemed legally frivolous on the basis of decisions that are arguably called into question by subsequent developments, even though the older decisions have not yet been reexamined by this Court. Thus, the claim vindicated in Gardner v. Florida, 430 U.S. 349 (1977), was not frivolous in 1976 despite Williams v. New York, 337 U.S. 241 (1949); nor was the claim vindicated in Bullington v. Missouri, 451 U.S. 430 (1981), frivolous in 1980 despite Stroud v. United States, 251 U.S. 15 (1919).

26/ A claim cannot be deemed legally frivolous on the basis of a previous decision by the court of appeals which has gone unreviewed by this Court. Such decisions remain subject to repudiation either by this Court or -- in the event of intervening decisions of this Court -- by the court of appeals itself. See note 16 supra.

any factual basis whatsoever in the record of the case. For example, a death-sentenced appellant advancing an ex post facto argument identical to the one rejected in Dobbert v. Florida, 432 U.S. 282 (1977), would have a legally frivolous claim, as would a death-sentenced appellant who claims a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), when the record shows with indisputable clarity that the prospective jurors at issue were excused for reasons other than their attitudes toward the death penalty. This standard would allow the courts of appeals to weed out those rare capital habeas corpus appeals which have no basis in law or fact, without putting every condemned prisoner, his or her attorney and the courts through a breakneck, high-pressure "mini-appeal" in which mistakes can -- and over the course of time inevitably will -- be made.

We recognize that such a standard is roughly equivalent to that for dismissal of an appeal. See Fifth Circuit Local Rule 20, permitting dismissal of appeals that are "frivolous and entirely without merit." But that is as it should be. To execute a death-sentenced individual while his appeal is pending is certainly the functional equivalent of dismissing his appeal. Yet the panel which hastily reviewed petitioner's case consigned him to die without according him any more process than a dismissal would, and without holding the State to the showing of frivolity required for a dismissal. We respectfully submit that a condemned man or woman facing imminent execution is entitled to something more.

Because of the unique difference between execution and all other criminal sanctions, this Court

> has gone to extraordinary measures to ensure that the prisoner sen-

> tenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)(concurring opinion of Justice O'Connor). Its insistence upon such "extraordinary measures" applies both to the determination that the defendant is guilty and to the determination that he deserves to die. Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Gardner v. Florida, supra, 430 U.S. at 357-58 (1977)(plurality opinion); id. at 363-64 (concurring opinion of Justice White); Woodson v. North Carolina, 428 U.S. 280, 305 (plurality opinion). The decision below, denying Thomas A. Barefoot a stay of execution to permit one full opportunity for federal habeas corpus review of constitutional claims which manifestly are not legally frivolous, plainly violated these principles.

## II

## THE INTRODUCTION OF THE "HYPOTHETICAL" TESTIMONY OF DOCTORS GRIGSON AND HOLBROOK SEVERELY UNDERMINED THE RELIABILITY OF THE FACTFINDING PROCESS AT PETITIONER'S PENALTY TRIAL, IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS 27/

At the outset, it is relevant to note the context in which the "hypothetical" testimony of Doctors Grigson and Holbrook was offered. Between 1974 and 1977, Texas prosecutors introduced psychiatric testimony at the penalty phase of numerous capital trials. This testimony was commonly derived from pretrial psychiatric examinations at which the defendant had

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27/ The Fifth Circuit's failure to grant a stay of execution is, in and of itself, a sufficient ground for reversal of its January 20 order. One appropriate disposition would therefore be simply to remand this case to the court of appeals with instructions that it enter a stay of execution and consider the appeal in the ordinary course of business. Cf. Maxwell v. Bishop, supra; Burwell v. Teets, supra. However, since this Court has directed the parties to brief not only the question of the stay but also "the issues on the appeal before the United States Court of Appeals for the Fifth Circuit," 51 U.S.L.W. 3563 (Jan. 24, 1983), and since the above-titled issue is of particular concern to amicus, we will discuss it briefly in the pages that follow.

not been warned that anything he said might be used to seek his execution. However, eleven months prior to petitioner's trial, this practice was declared in violation of a capital defendant's Fifth Amendment rights in Smith v. Estelle, 445 F.Supp. 647 (N.D. Tex. 1977). In Thomas Barefoot's case the prosecutor, fearing that Smith might be affirmed on appeal,[28] concededly sought to circumvent the impact of Smith by using "hypothetical" testimony without actual psychiatric examinations -- a strategy he described at the federal habeas corpus hearing below as "pretty brilliant." T. 254.[29] To accomplish this end, the prosecutor relied upon two Texas psychiatrists, James P. Grigson and John T. Holbrook, who had testified for the State on the basis of pretrial examinations in the overwhelming majority of pre-Smith

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28/ It was. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd sub. nom. Estelle v. Smith, 451 U.S. 454 (1981).

29/ The practice of using "hypothetical" psychia-

[footnote 29/ continues on next page]

cases.[30]

The problem with this sort of psychiatric testimony is that it has absolutely no scientific basis. Since the American Psychiatric Association is also appearing as amicus curiae in this case, we will not burden the Court with repetition of the numerous reports of that organization or with citation of the many studies upon which those reports are based, documenting the utter unreliability of "hypothetical" psychiatric predictions of future dangerous-

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29/ continued

tric testimony at the penalty phase has surfaced in two other cases known to amicus. In both, the psychiatrist had examined the defendant and the jury had been told of the examination, but the prosecution nonetheless sought as best it could to cast the testimony primarily in hypothetical terms. In one of these cases federal habeas corpus relief has been granted as a result of the psychiatric testimony. White v. Estelle, ___ F. Supp. ___, Civil Action No. H-81-1661 (S.D. Tex. Dec. 30, 1982); in the other, Vanderbilt v. State, 629 S.W.2d 709 (Tex. Crim. App. 1981), a federal habeas corpus proceeding is pending.

30/ A summary of those appearances of Doctors Grigson and Holbrook in Texas capital cases which are known to amicus is set forth in Appendix B to this brief.

ness. Even in cases where the psychiatrist-witness has actually examined the defendant, the psychiatric community believes that prognosticating violent criminal acts in the indeterminate future stands, "generously analyzed -- at the fringes of professional responsibility" and brings the doctor to "the brink of quackery." Dix, The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, 5 Am. J. Crim. L. 151, 172 (1977). Where the psychiatrist has not examined the defendant, the profession's condemnation is unreserved.[31/]

This Court has held that

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31/ Neither of petitioner's expert witnesses at the hearing in the district court voiced anything but condemnation of the testimony of Doctors Grigson and Holbrook. The suggestions to the contrary in the opinions below are clearly unsupported by the record; indeed, they are contradicted by it. See Appendix C infra. Neither Dr. Fason nor Dr. Dickerson agreed that a bona fide medical diagnosis of sociopathy could be made of petitioner based upon a hypothetical question, and neither Dr. Fason nor Dr. Dickerson concurred in the view that medical experts are capable of predicting long-term future dangerousness.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. ... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The point has been repeated by the Court time and time again, and stands as the single most prevalent theme in its post-1976 decisions in death cases.[32/]

There is no constitutional novelty to the proposition that some evidence is so inherently unreliable that it should not be allowed to be submitted to a jury. Indeed, that was the very basis of this be allowed to be submitted to a jury. Indeed, that was the very basis of this Court's earliest decisions forbidding the

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32/ Gardner v. Florida, 430 U.S. 349, 359 (1977) (plurality opinion); id. at 363-64 (concurring opinion of Justice White); Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Green v. Georgia, 442 U.S. 95, 97 (1979); Beck v. Alabama, 447 U.S. 625, 637-38 & n. 13 (1980); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); id. at 118-19 (concurring opinion of Justice O'Connor).

use of involuntary confessions. In Brown v. Mississippi, 297 U.S. 278 (1936), the question before the Court was whether, in addition to the state-law principle that coercion might be shown to affect the jury's consideration of the weight of a confession (id. at 279), there should be a federal constitutional rule forbidding admission of a coerced confession into evidence. The Court adopted such a rule, in an opinion bespeaking a strong concern that the unreliability of the confession so outweighed its meager probative value that it would offend due process to allow it to be heard by the jury. Prior to the incorporation of the Fifth Amendment into the Fourteenth in Malloy v. Hogan, 378 U.S. 1 (1964), this concern appeared as the basis for decisions of the Court in other confession cases such as Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("this judgment can without difficulty be articulated in terms of the unreliability of the confes-

sion"). The principle was perhaps best expressed in Stein v. New York, 346 U.S. 156, 192 (1952):

> [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence.

And although incorporation of the Fifth Amendment brought new policy considerations into play which eventually overshadowed unreliability as the principal basis for suppression, the unreliability rationale remains a vital force that has not been lost upon members of this Court in modern times. See Brewer v. Williams, 430 U.S. 387, 423 (1977) (dissenting opinion of the Chief Justice)("[i]nvoluntary and coerced admissions are suppressed because of ... inherent unreliability"); Stone v. Powell, 428 U.S. 465, 496-97 (1976) (concurring opinion of the Chief Justice); Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973); Kaufman v. United States, 394 U.S. 217, 237 (1969) (dissenting opinion of Justice

Black); Linkletter v. Walker, 381 U.S. 618, 638 (1965).

Again, in the case of suggestive lineups and other identification procedures, this Court has determined that certain evidence is so unreliable yet prejudicial that due process does not permit the jury to even be told of it. Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293, 301-02 (1967), approving Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)(en banc). "It is the reliability of identification evidence that primarily determines its admissibility." Watkins v. Sowders, 449 U.S. 341, 347 (1981). See also Doyle v. Ohio, 426 U.S. 610, 617 (1976).

Perhaps in non-death cases it might seem overintrusive for this Court to classify unreliable testimony adduced through medical quackery together with unreliable eyewitness identifications and unreliable admissions of guilt by the defendant. Where human life was not at

stake, perhaps we could rest assured that cross-examination and rebuttal testimony would suffice to persuade the jury that the doctor's testimony is as specious and deceptive as it is in fact.[33/] But in death cases "members of the jury will have had little, if any, previous experience in sentencing, ... [and] are unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, 428 U.S. 153, 192 (1976)(plurality opinion). To allow an "expert" to testify at the penalty phase of a capital case, expressing a totally baseless opinion which addresses the very statutory question that the jury must answer in determining whether a human being will live or die, is so fraught with

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33/ We note, however, that in routine criminal cases the courts have almost universally barred evidence derived from lie detector tests, albeit upon non-constitutional grounds, precisely because such evidence is so inherently prejudical yet scientifically unreliable. See, e.g., People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969), and cases cited therein; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

the danger of delusion as to undermine the degree of reliability which this Court has insisted upon in capital sentencing as a requirement of the Eighth and Fourteenth Amendments.[34/] As the Supreme Court of California has held, such testimony simply has no place in a fair and rational death sentencing system. People v. Murtishaw, 175 Cal. Rptr. 738, 631 P.2d 446 (1981).[35/]

The court below was plainly wrong in believing that this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Estelle v. Smith, 451 U.S. 454 (1981), impliedly approved the use of hypothetical predictions of long-term future dangerousness when offered at Texas capital trials by psychiatrists who had never examined the defendant. Neither case, of course,

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34/ Cf. Bullington v. Missouri, 451 U.S. 430, 446 (1981)("in a capital sentencing proceeding it is the State, not the defendant, that should bear 'almost the entire risk of error'").

35/ See also Gholson v. Estelle, Civil Action

[footnote 35/ continues on next page]

involved any question of the sort. In Jurek the Court merely noted that the criminal justice system frequently makes assessments of dangerousness, and expressed no view as to what kind of evidence should or should not be considered in arriving at those assessments. 428 U.S. at 275-76. In Smith the Court interpreted Jurek as not necessarily "disapproving the use of psychiatric testimony bearing on the issue of future dangerousness," 451 U.S. at 473, but neither did the Court endorse the use of such testimony under all circumstances.[36/]

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35/ continued

No. W-78-CA-68, slip op. at 6 (W.D. Tex. Oct. 31, 1979)("Although not necessary to the disposition of the matter before it, the Court wishes to express its reservations about the validity of the conclusions reached by Drs. Holbrook and Grigson, as well as the relevancy of their testimony in deciding the special verdict questions under [Tex. Code. Crim. Pro.] Article 37.071"), aff'd on other grounds, 675 F.2d 734 (5th Cir. 1982).

36/ The Court said only that its "holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute.

[footnote 36/ continues on next page]

The Court took note of the strong concerns expressed by the American Psychiatric Association, 451 U.S. at 472, stated that "the inquiry mandated by Texas law does not require resort to medical experts" (id. at 473), and expressed no dissatisfaction with the notion that the State of Texas might have to "make its case on future dangerousness some other way" (id. at 469). This Court is well aware that "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis," there is a "serious question" as to whether such expert testimony can ever establish future dangerousness beyond a reasonable doubt. Addington

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36/ continued

A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." 451 U.S. at 472. Both of these careful reservations regarding the scope of the Fifth and Sixth Amendment prohibitions announced in Smith appear to contemplate a psychiatric examination of the defendant. Neither can conceivably be read as approving the admissibility of hypothetical psychiatric opinions of future dangerousness over Eighth Amendment objection.

v. Texas, 441 U.S. 418, 429 (1979). Apparently, the reasoning by which the Fifth Circuit concluded that Jurek and Smith had spoken to the issue presented in the instant case was that by approving a lay jury's decision regarding future dangerousness as the basis for a death sentence, the Court had necessarily committed itself to acceptance of the admissibility of testimony to the same conclusion "by a mental health professional, trained to detect mental illness and personality types." Slip op. at 10. But this is a complete non sequitur. For the Eighth Amendment vice of admitting hypothetical psychiatric testimony conjecturing at future dangerousness is precisely that it does appear to come from a trained mental health professional, and so is fatally misleading in view of its total scientific groundlessness. As the District Court for the Southern District of Texas perceptively

noted in White v. Estelle, ___ F.Supp. ___, Civil Action No. H-81-1661, slip op. at 17 (S.D. Tex. Dec. 30, 1982), such hypothetical speculation without examination of the defendant "is not a professional, but a lay opinion [footnote omitted]. However, when this lay opinion is proferred by a witness bearing the title 'Doctor,' its impact on the jury is much greater that if it were not masquerading as something it is not." The masquerade is what creates the unreliability, calling the Eighth Amendment into play.

Given "the gravity of the decision to be made at the penalty phase" of Texas capital cases, Estelle v. Smith, supra, 451 U.S. at 463, it would make a mockery of capital sentencing to turn every case into a battle of experts in which the prosecution first presents a psychiatrist such as Dr. Grigson to testify "hypothetically," and defense counsel then cross-examines with volumes of psychiatric literature, calls

representatives of the American Psychiatric Association as rebuttal witnesses, or both. Yet, given the persistence of Dr. Grigson and of Texas prosecutors (such as the one who tried petitioner's case) who believe that it is a "brilliant" idea (T. 254) to utilize his services in this fashion, that would be the inevitable result of an affirmance here. Surely, this Court did not, in upholding the Texas capital sentencing system in Jurek, intend to produce such a farce. The Court can and should consequently hold that the testimony of Doctors Grigson and Holbrook at petitioner's trial was so inherently unreliable as to be inadmissible in a capital case under the Eighth and Fourteenth Amendments.

## CONCLUSION

This Court should reverse the judgment of the Fifth Circuit and order the granting of habeas corpus relief to the extent of vacating petitioner's death sentence. In

the alternative, should the Court decline to resolve the merits of petitioner's constitutional claims, the Court should remand the case to the Fifth Circuit with instructions to enter a stay of execution and to hear petitioner's appeal.

Respectfully submitted,

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Dated: March 4, 1983

## APPENDIX A

### TESTIMONY OF DOCTORS HOLBROOK AND GRIGSON AT THE PENALTY PHASE OF PETITIONER'S TRIAL

Neither Doctor Holbrook nor Doctor Grigson had examined petitioner. SF 2014, 2063, 2073, 2101, 2110, 2132. Nevertheless, both were allowed to offer expert testimony, over petitioner's repeated objection (SF 2042-44, 2065-66, 2091, 2126, 2130-31), in which they diagnosed petitioner and predicted his future commission of violent criminal acts solely upon the basis of a lengthy "hypothetical" question which encompassed virtually every shred of testimony adduced by the prosecution at the guilt and penalty trials (SF 2016-31, 2073-91, 2111-26).

In this manner, Doctor Holbrook diagnosed Thomas Barefoot, "within a reasonable psychiatry [sic] certainty," as a "criminal sociopath." SF 2097. He testified that he knew of no treatment that could change this condition, and that the

condition would not change for the better but "may become accelerated" in the next few years. SF 2100. Finally, Dr. Holbrook testified as follows:

> Q. [By the Prosecutor] If you would assume the facts that I have given you in the hypothetical as true, can you tell us whether or not you have an opinion within reasonable psychiatric certainty as to whether or not there is a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society?
>
> * * *
>
> A. In my opinion he will.
>
> Q. Would that opinion change if we were talking about the society within the Texas Department of Corrections as opposed to the society of Bell County, Texas?
>
> A. It would not.

SF 2100-01.

Dr. Grigson testified, based solely upon the prosecutor's hypothetical question, that he could diagnose Thomas Barefoot "within reasonable psychiatric

certainty" as an individual with "a fairly classical, typical, sociopathic personality disorder." SF 2127-28. He placed petitioner in the "most severe category" of sociopaths, and stated that there was no known cure for this condition. SF 2129. Finally, Dr. Grigson testified to the following:

> Q. [By the Prosecutor] Assuming as true the facts of the hypothetical question which I have just recited to you, do you have an opinion within reasonable psychiatric certainty whether or not there is a probability that the defendant, Thomas Andrew Barefoot, will commit criminal acts of violence that would constitute a continuing threat to society?
>
> A. Yes, sir, I have an opinion to that.
>
> Q. What would that opinion be?
>
> A. Yes, he most certainly would.
>
> Q. Would you state whether or not that would be true regardless where he is?
>
> A. It wouldn't matter whether he was in the penitentiary or whether he

was free. Wherever he is he's going to continue what he's already been doing.

Q. Would you state whether or not, Doctor Grigson, you have an opinion within reasonable psychiatric certainty as to the degree of that probability that you have just expressed to this jury?

A. Well, yes, sir, I would put it at one hundred percent and absolute.

SF 2131.

On cross examination, Dr. Grigson conceded that he was not familiar with the American Psychiatric Association Task Force Report on Clinical Aspects of the Violent Individual and several other studies concerning the ability of psychiatrists to predict dangerousness. SF 2133-34. He then testified as follows:

Q. Are you aware, doctor, that it is the position of the American Psychiatric Association that psychiatrists cannot reliably predict whether or not someone -- criminals in the future are going to commit acts of violence?

A. No, that's not true. This is that same group that found homo-

sexuality was not an illness and this is a small minority group.

Q. I haven't identified the group, sir.

A. This is only a very small minority group. It's not the American Psychiatric Association that believes that.

SF 2134.

## APPENDIX B

## PRIOR APPEARANCES OF DOCTORS JAMES P. GRIGSON AND JOHN T. HOLBROOK AS WITNESSES FOR THE PROSECUTION IN TEXAS CAPITAL CASES

Amicus is aware of at least 23 capital cases in which Dr. Grigson has testified for the prosecution. His testimony is reported in Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976); Gholson v. State, 542 S.W.2d 395 (Tex. Crim. App. 1976); Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976); Moore v. State, 542 S.W.2d 644 (Tex. Crim. App. 1976); Collins v. State, 548 S.W.2d 368 (Tex. Crim. App. 1976); Hughes v. State, 563 S.W.2d 581 (Tex. Crim. App. 1978); Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978); Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1978); Simmons v. State, 594 S.W.2d 760 (Tex. Crim. App. 1980); Rodriquez v. State, 597 S.W.2d 917 (Tex. Crim. App. 1980); Brandon v. State, 599 S.W.2d 567 (Tex. Crim. App. 1980); Holloway v. State, 613 S.W.2d 497 (Tex. Crim. App. 1981);

Hawkins v. State, 613 S.W.2d 720 (Tex. Crim. App. 1981); Thompson v. State, 621 S.W.2d 624 (Tex. Crim. App. 1981); and the instant Barefoot case. Our scrutiny of state trial records and postconviction pleadings reveals that he also testified for the prosecution in Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976); White v. State, 543 S.W.2d 105 (Tex. Crim. App. 1976); Hovila v. State, 562 S.W.2d 243 (Tex. Crim. App. 1977); Jones v. State, 568 S.W.2d 847 (Tex. Crim. App. 1978); Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978); Armour v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979); Wilder v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979); and Burks v. State, 583 S.W.2d 389 (Tex. Crim. App. 1979).

In Chambers v. State, supra, Dr. Grigson testified that: "[m]y profession doesn't state that I've got to wait until

he kills twenty people before I can call him a sociopath." 568 S.W.2d at 326. When asked by defense counsel why another examination of the defendant was unnecessary, the doctor responded: "I don't need to see him again and put my life in jeopardy." Ibid. And the doctor described the defendant as a "'cancerous type person' who should be removed from society." Ibid. In Rodriguez v. State, supra, Dr. Grigson testified to alleged extraneous unadjudicated offenses of the defendant based solely upon the prosecutor's statements to him, when in fact the offense reports for those offenses (which the doctor had not bothered to read prior to his testimony) declared the charges to be "unfounded." 597 S.W.2d at 925 (Phillips, J. dissenting).

In Holloway v. State, supra, Dr. Grigson did not examine the defendant but rather testified solely on the basis of his conversations with police officers, jail

officials and other persons who knew the defendant, plus his review of the offense report and a medical information form filled out by the defendant upon admission to the county jail. The Texas Court of Criminal Appeals held this testimony inadmissible on state law grounds. 613 S.W.2d at 500-03.

Prior to his suicide in 1980, Dr. Holbrook testified for the prosecution in 13 capital cases of which we are aware. He appeared with Dr. Grigson in Gholson, Livingston, Moore, Hughes, Adams, Brandon, Boulware, White, Ferguson, and the instant Barefoot case. He also testified on his own in Ross v. State, 542 S.W.2d 395 (Tex. Crim. App. 1976); Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976); and Muniz v. State, 573 S.W.2d 792 (Tex. Crim. App. 1978).

We are aware of a total of 39 Texas

capital cases in which psychiatrists have testified for the State. Dr. Grigson's 23 represents 59% of this total; Dr. Holbrook's 13 represents one-third of the total. As of 1979, Dr. Grigson claimed to have testified for the State in more than 50 Texas capital cases. See Dallas Times Herald, Sept. 30, 1979, p. 1. See also Bloom, Killers and Shrinks, The Texas Monthly, July 1978.

## APPENDIX C

## TESTIMONY OF THE EXPERT WITNESSES AT THE HEARING IN THE DISTRICT COURT

Petitioner called two expert witnesses, psychiatrist Fred L. Fason and psychologist Wendell Lee Dickerson. T. 7-8, 93.*/ Both were extremely critical of the testimony of Doctors Grigson and Holbrook at petitioner's trial.

Dr. Fason, who personally believes in capital punishment (T. 47), testified that no responsible physician would render a diagnosis to a reasonable medical certainty without taking a complete history, performing tests, and conducting a thorough examination. T. 24, 29-30, 34, 36, 44, 46, 48, 54, 73. He stated flatly that "from a hypothetical situation all you can arrive at is an impression but not a diagnosis to a reasonable degree of medical certainty." T. 44. He added that

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*/ Numbers preceded by "T." refer to pages of the transcript of the hearing conducted in the federal district court.

> There isn't a leading hospital in this country that would allow you to continue to practice on the staff if you made life and death decisions on that sort of inadequate data . . . other than [in] an emergency.

T. 36. Dr. Fason criticized the rendering of a diagnosis to a reasonable medical certainty in this case as "absurd," T. 36, stating that in any hospital where he was on the staff, if a doctor said that he was 100% sure of something without examining the patient "we would kick him off the staff of the hospital for his arrogance." T. 48.

Dr. Fason testified that if asked by a medical student for an opinion based upon the hypothetical question in this case, he would guess a 90% impression of sociopathy. T. 22. But he stressed that this 90% figure referred solely to an "initial impression," T. 22, 56, 72, not a diagnosis to a reasonable degree of medical certainty. T. 44. He maintained firmly that the hypothetical

question provided insufficient data for any responsible doctor "to have arrived at a diagnosis with a reasonable degree of medical certainty." T. 54.

Dr. Fason's testimony dealt almost entirely with the rendering of a diagnosis based upon a hypothetical question, and did not dwell upon the general ability of psychiatrists to predict probable future dangerousness. He did, however, state that as a psychiatrist he could not testify that there is no cure for a sociopathic condition and could not testify that a defendant sentenced to life imprisonment would present a danger to other inmates in the prision system. T. 46-47.

Dr. Dickerson flatly refused to render any diagnosis of petitioner based upon the hypothetical question: "I would decline to make any diagnostic impression of Mr. Barefoot." T. 116. He agreed that if he were asked to respond to the hypothetical

on a medical board examination he would suspect sociopathy, although he wouldn't rate the degree of suspicion as high as 90%. T. 116-117. He likened betting on the outcome of a "real diagnostic study" to "asking me to bet on a horse race." T. 116.

Dr. Dickerson further testified that, regardless of the diagnosis, psychiatrists and psychologists are incapable of predicting long-term future dangerousness. T. 95-98, 100, 108-109. He cited to several respected studies, including one of violent offenders, confirming this point. T. 94-98. He summarized the literature as follows:

> with our ability to predict at this point, we have got to recognize that we are wrong in about 2 out of every 3 of the people that we have predicted would commit a future act of violence.

T. 108.

Dr. Dickerson stressed that he was

firm in this conclusion regardless of the diagnosis in a given case. In his experience, after serving for four years as Chief of Psychological and Mental Health Services for the Texas Department of Corrections (T. 94), "probably 70 percent of the folks in there could be diagnosed as a sociopath, whatever that wastebasket diagnosis means." T. 102. Dr. Dickerson testified that even if one is 90% sure that an individual is a sociopath, one cannot be 90% sure in predicting that he will commit future acts of violence. T. 118. To the contrary, "whatever the [diagnostic] estimate was we have to recognize that the possibility of being wrong in that prediction is about 2 out of 3." T. 118.

Dr. Dickerson testified that Dr. Grigson's claim that he could predict future violence on Mr. Barefoot's part to a 100% degree of certainty "is not

supported by any ... of the objective research on the issue." T. 100. "I find absolutely no evidence in the professional literature, or even the folklore of the profession to substantiate such a claim." T. 109.

The State called two expert witnesses, psychologist George Parker and psychiatrist Richard Koons. T. 184, 207, 224. Both agreed that not all sociopaths will commit future acts of violence that are dangerous to society, T. 189, 244, and both were unwilling to endorse Dr. Grigson's absolute certainty that petitioner would commit future violent acts. T. 190, 232, 245. Dr. Parker added that the claim that petitioner was incapable of being cured and would present a danger to other prisoners could be "misleading." T. 220, 221.

Dr. Parker believed that predictions of future dangerousness become more accurate

in the case of convicted felons who have commited violent crimes, T. 199, 203, but was reluctant to fix a precise percentage as to the degree of accuracy of the prediction in this case, T. 190. He said that if he "were pressed and pressed and asked to answer that kind of question," he'd put the likelihood of future dangerousness "somewhere around 90 percent. I would say that the likelihood that he will do something in the future is much greater than it is that he would not do something dangerous in the future. Now, whether it is 70 percent or 98 percent or whatever, I don't know how you answer a question like that." T. 190-91.

Dr. Koons did not testify to any percentage, but only termed the likelihood in petitioner's case "quite high" and "very high." T. 231, 232. He further testified on cross examination that he personaly had

never diagnosed a defendant in a capital case as a sociopath based solely upon a hypothetical question, and that he did not know of any psychiatrists who had done so other than James Grigson and John Holbrook. T. 237-38.

## APPENDIX D

## CAPITAL CASES KNOWN TO AMICUS IN WHICH UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS HAVE GRANTED STAYS OF EXECUTION

### I. Post-1976 Cases In The Fifth Circuit

Prior to its January 20, 1983 decision in the instant case, the Fifth Circuit had granted stays of execution in at least eleven cases of which amicus is aware. Spinkellink v. Wainwright, No. 77-2940 (Sept. 6, 1977); Jurek v. Estelle, No. 78-1374 (Feb. 28, 1978); Burns v. Estelle, No. 78-3109 (Sept. 27, 1978); Potts v. Zant, Nos. 80-7476 & 80-7477 (June 28, 1980), motion to vacate denied, 448 U.S. 904 (1980); Gray v. Lucas, No. 81-4018 (Jan. 16, 1981); Williams v. Blackburn, No. 81-3159 (March 28, 1981); Baldwin v. Blackburn, No. 81-3249 (May 8, 1981); Bevans v. Maggio and Clark v. Maggio, Nos. 81-3668 & 81-3669 (Nov. 2, 1981); Baldwin

v. Maggio, No. 82-3318 (May 24, 1982); Bass v. Estelle, No. 82-2341 (Aug. 17, 1982), motion to vacate denied, 51 U.S.L.W. 3252 (Oct. 4, 1982); O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982), motion to vacate denied, ___ U.S. __, No. A-396 (Oct. 29, 1982). Subsequent to the denial of a stay in this case, the Fifth Circuit has granted stays in Porter v. Estelle, No. 82-2499 (Feb. 1, 1983), and Autry v. Estelle, No. 83-2053 (Feb. 17, 1983).

II. Post-1976 Cases In All Other Circuits

The other Circuits have granted stays of execution in every capital case to come before them since 1976. Not a single stay application has been denied. The Eleventh Circuit has granted stays in at least ten cases of which we are aware: Ford v. Strickland, No. 81-6200 (Dec. 7, 1981); Finney v. Zant, No. 81-8006 (Dec. 26, 1981); Mulligan v. Zant, No. 82-8027 (Jan.

20, 1982); Antone v. Strickland, No. 82-5120 (Feb. 1, 1982); Dobbert v. Strickland, 670 F.2d 938 (11th Cir. 1982); Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982); Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982); Shriner v. Wainwright, No. 82-5469 (April 20, 1982); Hance v. Zant, No. 82-8342 (June 9, 1982); Brooks v. Zant, No. 83-8028 (Jan. 12, 1983); See also Westbrook v. Zant, No. 81-7836 (Oct. 16, 1981), granting certificate of probable cause denied by the district court, 518 F.Supp. 1262 (M.D. Ga. 1981). The Fourth Circuit has granted stays in two such cases: Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980), reenforced sub. nom. In re Shaw, No. 81-1396 (May 15, 1981); Briley v. Hutto, No. 81-6261 (April 23, 1981). And the Ninth Circuit has granted the one stay application to come before it: Harris v. Pulley, No. 82-5427 (March 12, 1982).

III. Post-1976 Cases In The District Courts

Most district courts have routinely granted stays of execution without opinion upon the filing of a federal habeas corpus petition by a death-sentenced individual. Four cases known to amicus in which opinions have been written upon the granting of such stays are Straight v. Wainwright, No. 82-607-Civ.-J-JHM (M.D. Fla. June 15, 1982) ("Absent a willingness to violate my oath of office, the undersigned is left with two choices; either grant the stay in accordance with the dictates of the law, or resign from the federal bench"); Tyler v. James, Civil Action No. C82-36A (N.D. Ga. Jan. 19, 1982) ("Requiring a person to demonstrate a substantial likelihood of prevailing on the merits in a death case is inappropriate when the applicant's life is hanging in the balance. It is not realistic to apply that standard if the loss of

human life is imminent.... A more appropriate standard ... is whether the petitioner has demonstrated to the court any likelihood of prevailing on the merits") (emphasis in original); Foster v. Strickland 515 F.Supp. 22, 24 (N.D. Fla. 1981) ("Mr. Foster's statutory and constitutional rights to petition this court for habeas corpus relief would be meaningless if he were executed while his petition is pending"); and Miller v. Lockhart, 515 F.Supp. 3, 5 (E.D. Ark. 1981)("the Court cannot conclusively state that these grounds are frivolous, without merit, and being raised solely for the purpose of delay").

IV. Pre-1976 Cases

In earlier times many courts of appeals -- especially the Fifth Circuit -- as well as many district courts routinely granted stays of executions. See, e.g., Brent v. White, 398 F.2d 503 (5th Cir.

1968); Mobley v. Dutton, 380 F.2d 14 (5th Cir. 1967); Clarke v. Grimes, 374 F.2d 550 (5th Cir. 1967); Kerrigan v. Scafati, 348 F.2d 187 (1st Cir. 1965); Whitney v. Wainwright, 339 F.2d 275 (5th Cir. 1964); United States ex rel. Goins v. Sigler, 250 F.2d 128 (5th Cir. 1957); Ellis v. Ellisor, 239 F.2d 175 (5th Cir. 1956); United States ex rel. De Vita v. McCorkle, 214 F.2d 823 (3rd Cir. 1954); Fouquette v. Bernard, 198 F.2d 96 (9th Cir. 1952)(Denman, C.J.); Thomas v. Duffy, 191 F.2d 360 (9th Cir. 1951)(Denman, C.J.); Modesto v. Nelson, 296 F.Supp. 1375 (N.D. Cal. 1969); Brown v. Brough, 248 F.Supp. 342 (D. Md. 1965); Moorer v. State of South Carolina, 240 F.Supp. 529 (E.D.S.C. 1964); Crawford v. Bailey, 234 F.Supp. 706 (E.D.N.C. 1964).

## APPENDIX E

## CAPITAL CASE DECISIONS BY THE UNITED STATES COURTS OF APPEALS: 1976 - Feb. 1983

* Decided in Favor of Death-Sentenced Individual

(S) State's Appeals

### FIFTH CIRCUIT

1. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)

* 2. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. (1978)

* 3. Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), modified en banc, 623 F.2d 929 (5th Cir. 1980)(en banc), cert. denied, 450 U.S. 1014 (1981)

* 4. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (5th Cir. 1980)(en banc)

* (S)5. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed, 451 U.S. 454 (1981)

* 6. Evans v. Bennett, 628 F.2d 400 (5th Cir. 1980), rehearing denied with opinion, 639 F.2d 221 (5th Cir. 1981), reversed sub. nom. Hopper v. Evans, ___ U.S. ___, 72 L.Ed. 2d 367 (1982)

* 7. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended on rehearing, 648 F.2d 446 (5th Cir. 1981), question certified to Supreme Court of Georgia, ___ U.S. ___, 72 L.Ed. 2d 222 (1982)

* 8. Potts v. Zant, 638 F.2d 727 (5th Cir. 1981), cert. denied, 454 U.S. 877 (1981)

9. Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981), adhered to en banc, 679 F.2d 381 (5th Cir. 1982) (en banc)

10. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981), cert. denied, ___ U.S. ___, 72 L.Ed. 2d 475 (1982)

* 11. Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1007 (1982)

* 12. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

* 13. Washington v. Watkins, 655 F.2d 1346, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, ___ U.S. ___, 72 L.Ed. 2d 474 (1982)

14. Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), amended on rehearing, 671 F.2d 858 (5th Cir. 1982), cert. denied, ___ U.S. ___, 74 L.Ed. 2d 148 (1982)

* (S)15. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated and remanded for reconsideration, ___ U.S. ___, 73 L.Ed. 2d 1326 (1982), adhered to on remand, 686 F.2d 311 (5th Cir. 1982)

* 16. Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, ___ U.S. ___, 73 L.Ed. 2d 1374 (1982); remanded with instructions, 683 F.2d 881 (5th Cir. 1982)

* (S)17. Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981), adhered to en banc, 695 F.2d 124 (5th Cir. 1983)(en banc)

* 18. Mason v. Balkcom, 669 F.2d 222 (5th Cir. 1982)

* (S)19. Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982), cert. denied, ___ U.S. ___, 73 L.Ed. 2d 1375 (1982)

* 20. Washington, Strickland, 673 F.2d 879 (5th Cir. 1982), modified en banc, 693 F.2d 1243 (5th Cir. 1982) (en banc)

* (S)21. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982)

* (S)22. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)

23. Gray v. Lucas, 677 F.2d 1086, rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982)

* 24. Jordan v. Watkins, 681 F.2d 1067, rehearing denied with opinion, 688 F.2d 395 (5th Cir. 1982)

* 25. Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982)

* 26. Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982) rehearing denied with opinion, ___ F.2d ___, No. 81-3792 (5th Cir. Feb. 10, 1983)

27. Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983)

EIGHTH CIRCUIT

* 28. Holtan v. Parratt, 683 F.2d 1163 (8th Cir. 1982)

NINTH CIRCUIT

29. Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3420 (Nov. 29, 1982)

* 30. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982)

TENTH CIRCUIT

* 31. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981)

ELEVENTH CIRCUIT

32. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), adhered to en banc, 696 F.2d 804 (11th Cir. 1983)(en banc)

* (S)33. Young v. Zant, 677 F.2d 792 (11th Cir. 1982)

* 34. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982)

* 35. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), modified, ___ F.2d ___, No. 81-7132 (11th Cir. Nov. 1, 1982)

* 36. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)

* 37. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983)

38. Sullivan v. Wainwright, ___ F.2d ___, No. 81-5843 (11th Cir. Jan. 17, 1983)

39. Stanley v. Zant, ___ F.2d ___, No. 81-7615 (11th Cir. Feb. 10, 1983)

* 40. Thomas v. Zant, ___ F.2d ___, No. 81-7675 (11th Cir. Feb. 10, 1983)

41. Darden v. Wainwright, ___ F.2d ___, No. 81-5590 (11th Cir. Feb. 14, 1983)1/

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1/ In addition to the 41 above-cited cases, the courts of appeals have issued four opinions which were procedurally relevant to death-sentenced

[Footnote continues on next page]

TOTALS

Fifth Circuit

Including State's Appeals

Total Number of Appeals .....27

Total * .....21 (77.7%)

Excluding State's Appeals

Total Number of Appeals .....21

Total * .....15 (71.4%)

All Circuits

Including State's Appeals

Total Number of Appeals .....41

Total * .....30 (73.2%)

Excluding State's Appeals

Total Number of Appeals .....34

Total * .....23 (67.6%)

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1/ continued

individuals but did not actually decide their cases. See Gibson v. Jackson, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119 (1979); Harris v. Oliver, 645 F.2d 327 (5th Cir. 1981), cert. denied, 454 U.S. 1109 (1981); In re Wainwright, 678 F.2d 951 (11th Cir. 1982); and Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982). Only the last of these was unfavorable to the death-sentenced prisoner.